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No. 80-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

YOUNGSTOWN SHEET AND TUBE COMPANY D/B/A FIBERCAST COMPANY, A DIVISION OF YOUNGSTOWN SHEET AND TUBE COMPANY AND T. E. BYERLY COMPANY, *Petitioners*

v.

PIERCE ASSOCIATES, INC., *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues raised by the petition are of sufficient importance to warrant this Court's attention.

2. Whether the court of appeals erred in holding that it was precluded from considering an alleged jury instruction error because petitioners had failed to object to the instruction as required by the Federal Rules of Civil Procedure and because petitioners had, in fact, requested a similar instruction which was never withdrawn by petitioners.

3. Whether the court of appeals fully considered petitioners' contention that there was insufficient evidence to submit the case to the jury on the issue of whether the pipe and fittings met the specifications of the contract between the parties.

4. Whether the court of appeals erred in refusing to find error on the part of the district court in submitting the issue of whether all warranties had been disclaimed by the contract between the parties to the jury.

5. Whether the court of appeals erred in finding no error in the conclusion of the district court that there was substantial evidence to warrant the submission of the case to the jury on the issue of whether the pipe and fittings were fit for the particular purpose for which they were intended.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

All parties who were before the Court of Appeals are listed in the caption of the case in this Court.*

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* As required by Rule 28.1 of the Supreme Court Rules, Respondent certifies that there are no parent companies, subsidiaries or affiliates of Respondent, Pierce Associates, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 22 of the Rules of this Court, respondent, Pierce Associates, Inc. ("Pierce") submits this brief in opposition to the petition for writ of certiorari filed herein.

STATUTES AND REGULATIONS

Petitioners have failed to include D.C. Code §28:2-313 which is also applicable to this case:

D.C. Code §28:2-313. *Express Warranties by Affirmation, Promise, Description, Sample*

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. (Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, §1, eff. Jan. 1, 1965).

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case contains several inaccuracies or omissions which require clarification.

I.

The contract between the Parties not only provided for the sale by petitioner (hereinafter "Youngstown and Byerly") to respondent (hereinafter "Pierce"), of fiberglass pipe and fittings, but also the epoxy adhesive

material used to assemble the pipe and fittings. Detailed written and verbal instructions were also supplied by Youngstown and Byerly to Pierce on the proper manner of assembling the pipe and fittings. The contract between the parties expressly required that the items furnished be in strict compliance with the plans and specifications for the project and the specifications also required that the manufacturer, Youngstown, provide on-site supervision of the pipe assembly, hanging and installation. The specifications further expressly required that the pipe and fittings were to be assembled and installed in accordance with Youngstown's instructions and, when installed, the system was required to withstand certain specified pressure tests which, admittedly, the pipe and fittings failed to withstand after being installed by Pierce (Px. 1, 1A, 2, 3).

II.

The contention that Pierce's witnesses admitted at the trial that there was nothing wrong with the pipe and fittings in themselves is misleading. Furthermore, the statement that counsel for Pierce had stated during a conference with the district court that no contention was being made that the pipe and fittings in and of themselves did not meet the contract specifications is an incorrect statement. What Pierce's witnesses testified to, and what counsel for Pierce had reference to, was the fact that the pipe and fittings were not defective (i.e., free from manufacturing defects). But the fact that the pipe and fittings were not defective is not the same thing as meeting the performance requirements of the specifications. The complained of instruction must be read in its entirety and in the context of the full charge to the jury. What the District Court instructed the jury was that Pierce was required to fabricate and install the

pipe and fittings in accordance with Youngstown and Byerly's instructions and if, when so installed, the pipe and fittings failed to meet the specifications of the contract, Pierce was entitled to recover its damages. The failure of the pipe and fittings to meet the required pressure tests was undisputed at trial and hence the pipe and fittings did not meet the specifications, notwithstanding the fact that there were no manufacturing defects in the pipe and fittings.

III.

The disclaimer issue was not raised by either Youngstown or Byerly in their answers to the complaint as an affirmative defense, but was raised first during trial. The district court submitted to the jury the issue of whether the contract between the parties disclaimed all warranties. No objection was ever made by Youngstown or Byerly to the district court's instruction on this issue.

REASONS FOR DENYING THE WRIT

I.

This action was instituted in the United States District Court for the District of Columbia with jurisdiction based on diversity of citizenship under 28 U.S.C. §1332. No federal statutes or important issues of federal law are involved. The only statutes which are involved are certain provisions of the District of Columbia Code, adopting provisions of the Uniform Commercial Code, relating to warranties on the sale of goods, for application in the District of Columbia. All other substantive issues, except for the warranty issues, arise under the common law of the District of Columbia. See *Del Vecchio* v. *Bowers,* 296 U.S. 280, 56 S. Ct. 190 (1935).

The issues raised by the petition involve no legal principles, the settlement of which is important to the public, as distinguished from the parties, and there is no conflict between the courts of appeal on any important and substantive question. *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951).

Petitioners have, in fact, utterly failed to comply with the requirements of Rule 17 of the rules of this Court, for the petition is devoid of any reference to special and important reasons why the writ should be granted.

A review of the petition reveals that each and every one of the questions presented for review would require, if the writ were granted, a review of the evidence to ascertain its sufficiency to support the jury instructions given by the district court or to warrant the submission of the case to the jury on various legal theories. This Court has said that it will not grant certiorari under such conditions. *General Talking Pictures Corp.* v. *Western Electric. Co.*, 304 U.S. 175, 58 S. Ct. 849 (1938).

II.

Petitioners complain that the court of appeals erred in refusing to consider their challenge to the district court's instruction on the issue of breach of contract on the ground that petitioners had waived any objection to the instruction by requesting a similar instruction in their pre-trial submission. However, a reading of the memorandum opinion of the court of appeals will reveal that the court of appeals' ruling on this issue was also predicated on the fact that petitioners had also failed to withdraw the requested instruction as the trial progressed or when the trial judge gave them an opportunity to be heard prior to her charge. Additionally, the court of ap-

peals found that petitioners failed to object to the challenged instruction after her charge as required by Rule 51 of the Federal Rules of Civil Procedure.

In their petition, Youngstown and Byerly quote only a portion of the complained of instruction. The entire instruction reads as follows:

> There is also no dispute that, as a part and parcel of this contract, plaintiff was to fabricate and install the pipe and fittings in accordance with the instructions provided by the defendant. If you find from a preponderance of the evidence that the pipe and fittings failed to meet the specifications of the contract, and that this failure proximately caused plaintiff's damages, and that plaintiff followed the verbal and written instructions provided by the defendant, then plaintiff is entitled to a verdict in its favor.
>
> If, however, you find from a preponderance of the evidence that plaintiff's personnel failed to follow the verbal and written instructions given them by the defendants, and that this failure proximately caused plaintiff's damages, then defendants are entitled to a verdict in their favor as to this theory (R. 830).

The position of Youngstown and Byerly before the court of appeals was that the district court erred in giving this instruction because it was not supported by the evidence.

The explanation given by Youngstown and Byerly as to why they proposed their instructions IX and X has no bearing on the issues involved in this case. The evidence introduced by Pierce, concerning a change from fitting sockets having a smooth interior to others with a sand blasted interior, was for the purpose of establishing knowledge on the part of Youngstown and Byerly that the epoxy adhesive material would not properly bond to

sockets with a smooth interior. However, as was established by the evidence, neither the fittings with smooth sockets nor the fittings with sand blasted sockets would meet the pressure test requirements of the specifications when installed in accordance with the instructions of Youngstown and Byerly.

The reliance of Youngstown and Byerly on the record of a conference between the court and counsel prior to submission of the case to the jury to support their argument that the pipe and fittings met the requirements of the specifications to the contract is totally misplaced. There was abundant evidence that the pipe and fittings failed to meet the specifications of the contract. It was undisputed that the original installation did not pass the pressure tests under the temperatures required by the specifications. The fact that the pipe and fittings may have had no inherent manufacturing defects does not mean that they met the specifications to the contract. The goods in issue, that is, the pipe and fittings (and, of necessity, the adhesive required to be used to install the pipe and fittings) were designed to perform a certain function when installed by following the installation instructions of the manufacturer. That function was further defined by the specifications which were part of Youngstown and Byerly's contract with Pierce. It is therefore a play on words to argue that because the pipe and fittings had no inherent defects, it follows that the pipe and fittings when installed in accordance with the manufacturer's instructions met the specifications of the contract when there is no dispute that the pipe system supplied by Youngstown did not meet the specifications of the contract. The specifications required a system which would meet certain pressure and temperature criteria. The pipe and fittings failed to meet these criteria

when installed in accordance with Youngstown's instructions. By the terms of the contract, Youngstown and Byerly did not contract merely to furnish Pierce with some off-the-shelf pipe and fittings; but, on the contrary, they contracted to instruct Pierce and the District of Columbia's personnel on proper installation procedures, to provide on-site supervision of Pierce's workmen, to assure ultimate compliance with the specification requirements, and to furnish a piping system which was represented as being in compliance with the specifications but which, in fact, did not perform as represented when installed in accordance with Youngstown's instructions and under the supervision of Youngstown's own personnel.

Youngstown and Byerly cite *Alabama Great Southern R. Co. v. Johnson,* 140 F.2d 968 (5th Cir. 1944), to support their contention that their objection to the challenged jury instruction was not waived by their pre-trial submission of a requested, similarly-worded instruction.

The *Johnson* case is clearly distinguishable. In *Johnson*, there was a timely objection to the instruction, whereas in the present case the opposite is true.

Youngstown and Byerly cannot rely upon the conference between counsel and the court to discuss the proposed instructions which took place prior to the conclusion of the evidence and prior to the presentation of final arguments to the jury pursuant to Federal Rules of Civil Procedure, Rule 51. To preserve an objection to the giving of an instruction, a party must state "distinctly the matter to which he objects and the grounds to his objection" *after* the jury charge and not before. *Carrillo v. Sameiat Westbuik*, 514 F.2d 1214 (1st Cir. 1975). Youngstown and Byerly failed to so object to the

challenged instruction and the court of appeals correctly held that their attack on such instruction came too late.

III.

Contrary to what Youngstown and Byerly contend in their petition, the court of appeals did not hold that the objections made by Youngstown and Byerly to the district court's charge to the jury were not sufficient to preserve for appellate review the question of whether the district court erred in allowing the jury to find for Pierce if it found the pipe and fittings failed to meet the specifications of the contract between the parties. The memorandum opinion of the court of appeals indicates that the court of appeals did, in fact, review the record; yet it found no error in the district court's conclusion that there was sufficient evidence to submit the case to the jury.

Youngstown and Byerly argued before the court of appeals that their motion for directed verdict, made at the conclusion of plaintiff's evidence, preserved their objections to the jury instructions given by the district court.

In their petition, Youngstown and Byerly now make the argument that the court of appeals improperly refused to consider the question of whether there was sufficient evidence to justify the submission of the case to the jury on the issue of whether the pipe and fittings failed to meet the specifications of the contract between the parties. Although the memorandum opinion of the court of appeals does not contain a detailed analysis of the evidence introduced in this case, it is clear that the court of appeals did review the evidence and that it found no error in the trial judge's conclusion that there was substantial evidence to warrant the submission of the case to the jury.

IV.

The argument of Youngstown and Byerly that all express and implied warranties as to both the pipe and fittings and the fabrication instructions accompanying the pipe and fittings were expressly excluded by the contract between the parties is the same argument it presented to the court of appeals.

The footnote to the memorandum opinion of the court of appeals indicates that the court of appeals felt that the district court committed no error on this issue.

The disclaimer issue was not pleaded as an affirmative defense in the answer of either Youngstown or Byerly. No testimony whatsoever was introduced during the trial concerning this issue and the only documents of record relevant to this issue are the proposal submitted to Pierce by Youngstown and Byerly and the purchase order issued by Pierce to them. The district court gave the following instruction to the jury which was never objected to by Youngstown or Byerly:

> In some instances the implied warranties running with goods may be included or modified. If you find that the parties expressly agreed to waive or limit the warranty or there was with the goods a conspicuous written exclusion or limitation of the warranty, or there was language to call the attention of the buyer to the exclusion of the warranty, then you may find that the implied warranty was waived or limited.
>
> However, before you can determine that the warranty was included or limited, you must, first, determine that this language may reasonably be interpreted as including or limiting such warranty (R. 834, 835).

Youngstown and Byerly gave detailed oral and written fabrication and installation instructions to Pierce

with the pipe, fittings and adhesive they supplied and represented to Pierce that a simple, trouble-free installation could be achieved by following such instructions.

Any "affirmation of fact or promise made by the seller" constitutes and express warranty. D.C. Code §28:2-313. Youngstown's and Byerly's fabrication instructions thus constituted an express warranty. See *Texsun Feed Yards, Inc.* v. *Ralston Purina Co.*, 447 F.2d 660, 668 (5th Cir. 1971). See also *Shotkoski* v. *Standard Chemical Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975) (improper instructions constituted a breach of warranty). By reason of the incorporation by reference of the prime contract specifications into Pierce's purchase order, Youngstown and Byerly also expressly warranted that the pipe system supplied would meet the prime contract specifications. See *Bevard* v. *Howat Concrete Co.*, 140 U.S. App. D.C. 76, 433 F.d 1202 (1970); *S-C Industries* v. *American Hydroponics System, Inc.*, 468 F.2d 852 (5th Cir. 1972); *Community T.V. Services, Inc.* v. *Dresser Industries, Inc.*, 586 F.2d 637 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 2052.

Youngstown and Byerly say that the disclaimer language of the proposal renders any express or implied warranties as to their fabrication instructions inoperative since "If the product and instructions are to be considered as one for the purposes of creating warranties, then they should be considered as one for the purpose of disclaiming warranties." This position is unreasonable and contrary to the clear directive of D.C. Code §28:2-316(1). See also Official Comment 1 to §2-316 of the Uniform Commercial Code.

Simply stated, once Youngstown and Byerly made express and implied warranties through the giving of detailed oral and written instructions, such warranties

could not be disclaimed since such a disclaimer would be inconsistent with the instructions. It is manifestly unreasonable to give detailed instructions on the proper use of a product and then claim no liability for giving them. The cases are uniform in holding that general disclaimers, such as Youngstown's and Byerly's do not operate against express warranties. See e.g. *Community T.V. Services, Inc.* v. *Dresser Industries, Inc., supra* (language which limits or negates an express warranty is inoperative against express warranties made in advertising brochures); *Potler* v. *MCP Facilities Corp.*, 471 F. Supp. 1334 (E.D.N.Y. 1979).

Youngstown's and Byerly's position should also be rejected based upon the clear terms of the contract between the parties. The disclaimer language of the proposal refers only to the "goods". If a manufacturer wishes to protect itself from breach of warranty claims arising from improper instructions which are provided with their product, the statute provides for a means of accomplishing this — yet the terms of the statute were not complied with with respect to any disclaimer as to the adequacy or accuracy of Youngstown's and Byerly's installation instructions. As White and Summers state:

> The very idea that a seller may disclaim an express warranty may seem illogical or dishonest. How could a seller legitimately disavow an express representation of his that by definition was "part of the basis of the bargain".

See White & Summers, *Uniform Commercial Code* §12-2, p. 351 (1972).

Despite the disclaimer language of the proposal, the trial court was not in error in submitting the issue of whether there was a disclaimer of all or any warranties to the jury. Whether a seller intends to disclaim certain warranties or whether a disclaimer was sufficient to

disclaim them is a factual issue. See *Noel Transfer & Package Delivery Service, Inc.* v. *General Motors Corp.*, 341 F. Supp. 968 (D. Minn. 1972); *Mendenhall* v. *Marion Foods Corp.*, 57 App. Div. 2d 1041, 395 N.Y.S. 2d 808 (1977); *Gilmore* v. *St. Anthony Hospital,* 598 P.2d 1200 (Okla. Sup. Ct. 1979).

V.

The final argument of Youngstown and Byerly is that there was insufficient evidence to warrant the submission of the issue of whether Youngstown and Byerly breached an implied warranty of fitness for a particular purpose to the jury.

Here, again, it is clear that the court of appeals concluded upon a review of the entire record that there was no error in the district court's conclusion that there was substantial evidence to warrant the submission of this issue to the jury.

Youngstown and Byerly return once again to their argument that, because there were no defects in the pipe and fittings themselves, there was no breach of warranty. There was an abundance of evidence that the pipe and fittings could not be successfully installed by following the instructions furnished by Youngstown and Byerly for the pipe and fittings, when installed in accordance with those instructions, failed to meet the performance criteria of the specifications.

Mitchell Pallet & Lumber Co. v. *Kockum Industries, Inc.*, 340 F. Supp. 389 (E. D. Mo. 1972) is factually distinguishable. The failure of the chipper in that case to perform as anticipated was due to circumstances not anticipated, namely nails being fed into the chipper and, in many instances, because the wood itself was seasoned and thus too hard for the chipper to properly

chip. The factual situation in that case is entirely different from the situation in the present case. The pipe and fittings did not meet the specifications because the adhesive supplied by Youngstown and Fibercast would not provide a proper bond if Youngstown's and Byerly's installation instructions were followed.

Youngstown and Byerly knew at the time of the sale the purpose for which the pipe and fittings were being purchased by Pierce and they knew that Pierce was relying on their skill and judgment to select or furnish suitable goods. Youngstown and Byerly thus impliedly warranted that the pipe and fittings were fit for the particular purpose intended. D.C. Code §28-2-315. That intended purpose included the ability to withstand the specified pressure tests. The pipe and fittings, when installed in accordance with the instructions of Youngstown and Byerly, did not meet those pressure tests and therefore it is clear that Youngstown and Byerly breached their implied warranty.

Respondent submits that the court of appeals did not err in finding no error in the conclusion of the district court that there was substantial evidence to warrant the submission of the case to the jury on the issue of whether the pipe and fittings were fit for the particular purpose for which they were intended.

CONCLUSION

Petitioners have demonstrated no special or important reason why a writ should be issued. The Court of Appeals fully considered all of the issues raised in the Petition based upon a review of the record in the District Court and correctly decided those issues. The Petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of Respondent's Brief in Opposition were served on Counsel for Petitioners by placing three copies of same in the United States Mail, first class postage prepaid, to Jeff Crane, Esquire and Michael E. Alexander, Esquire, at Vinson & Elkins, First City National Bank Building, Houston, Texas 77002, this _____ day of April, 1981.

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